No. 17-949

IN THE

Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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October 11, 2018

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INTRODUCTION

The Alaska National Interest Lands Conservation Act ("ANILCA") unambiguously provides that only lands and waters to which the United States holds "title" are deemed "public lands" subject to the regulatory jurisdiction of the National Park Service ("NPS"). 16 U.S.C. §§ 3102, 3103(c). The federal government—as it concedes—does not hold title to the navigable waterways at issue here. That should be dispositive. And if there were doubt, ANILCA's history, structure, and purpose—as well as the clear statement rule—all confirm that Congress limited NPS management authority in Alaska to only the statutorily-designated "public lands."

NPS offers a limited (and unpersuasive) defense of the Ninth Circuit's decision. Instead, NPS tries to change the subject, arguing that the key statute here is not ANILCA but rather its general management statute, the National Park Service Organic Act ("Organic Act"). In NPS's view, the Organic Act grants it plenary regulatory authority over all waters "within" ANILCA conservation system units ("CSUs"), regardless of title or ownership. But that is untenable. ANILCA *both* created the national parks at issue *and* imposed critical Alaska-specific restrictions on NPS management of such lands and waters. That is the bargain Section 103(c) embodies: it "draws a distinction between 'public' and 'non-public' lands within the boundaries of [CSUs] in Alaska." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1071 (2016). NPS would obliterate that distinction by seizing control of non-federal waters that Congress placed beyond its general Organic Act authority.

NPS may see Alaska's navigable waters as equivalent to any other located within a national park unit elsewhere. "To a hammer," after all, "everything looks like a nail." *American Exp. Co. v. Italian Colors Restaurant*, 570 U.S. 228, 252 (2013) (Kagan, J., dissenting). But NPS continues to ignore the "simple truth that Alaska is often the exception, not the rule." *Sturgeon*, 136 S. Ct. at 1071. Congress resolved a longstanding controversy in Alaska by expanding the National Park System in a way that ensured that non-federal territory newly encircled by these parks was not subject to NPS's general management authority. Congress's judgment—expressed in Section 103(c) of ANILCA—must be enforced.

ARGUMENT

I. NPS's Reliance on the Organic Act Is Misplaced.

NPS's lead argument (at 25-32) is that the key statute here is not ANILCA—which specifically addresses Alaska lands—but instead the Organic Act, which grants NPS management authority over certain waters "within" park boundaries. 54 U.S.C. § 100751(b). That argument rests on a fundamental misconception of the relationship between ANILCA and the Organic Act.

NPS asserts at least 15 times (at 2, 13, 16-17, 20-22, 24, 26, 30, 32, 37, 40, 44, 46) that Mr. Sturgeon is advancing an interpretation of ANILCA that would "strip" or "divest" NPS of its authority under Section 100751(b). Repeating it does not make it true. NPS ignores that it had *no* authority over these waters until ANILCA expanded the National Park System by more than 43 million acres in 1980. ANILCA both created these new national park units *and*

imposed Alaska-specific restrictions on NPS's authority. NPS's characterization of ANILCA as mostly irrelevant to its authority under the Organic Act thus falls flat.

Indeed, ANILCA repeatedly states that the new CSUs must be managed consistent with NPS's general authority *and* in accordance with ANILCA's terms and conditions. The first sentence of the section that established the ten new units of the National Park System (including Yukon-Charley) states that they "shall be administered by the Secretary under the laws governing the administration of such lands *and under the provisions of this Act.*" 16 U.S.C. § 410hh (emphasis added); *see also id.* § 410hh-2 (directing the Secretary to administer new additions to the National Park System pursuant to NPS's enabling acts and "the other applicable provisions of this Act"); *id.* § 3201 ("A National Preserve in Alaska shall be administered and managed as a unit of the National Park System in the same manner as a national park except as otherwise provided in this Act."). NPS's general park-management authority must be exercised subject to ANILCA's Alaska-specific restrictions.[1]

To the extent there is any tension between ANILCA and the Organic Act, then, ANILCA—as both the more recent and more specific enactment—takes precedence:

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1. ANILCA is not unusual in this regard. Statutes creating new units of the National Park System often contain additional park-specific restrictions. As NPS itself has recognized, "[t]he management and administration of park areas must be in accordance with both the general laws relating to the National Park System and the more specific laws relating to the authorization and administration of a particular park unit." 48 Fed. Reg. 30,252 (June 30, 1983).

"a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it [has] not been expressly amended." *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998). That is especially true where, as here, "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX Gateway Hotel v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). NPS's attempt to justify the hovercraft ban under its Organic Act wholly apart from ANILCA violates bedrock principles of statutory interpretation.

II. NPS Fundamentally Misconstrues the Text, Purpose, History, and Structure of ANILCA.

NPS's attempt to reconcile its position with ANILCA fares no better than its attempt to circumvent the statute. NPS tries to frame Section 103(c) as a minor, technical afterthought that has little substantive impact. But those arguments fail at every step.

A. NPS's Position Is Contrary to the Text of ANILCA.

Section 103(c) of ANILCA provides that "[o]nly those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit." 16 U.S.C. § 3103(c). "Public lands" are defined in relevant part as "Federal lands," which are in turn defined as "lands the title to which is in the United States." *Id.* §§ 3102(2)-(3). ANILCA further instructs that "[n]o lands which, before, on, or after [the date of enactment of this Act], are conveyed to the State, to any Native Corporation,

or to any private party shall be subject to the regulations applicable solely to public lands within such units." *Id.* § 3103(c). Finally, the statute provides that non-public lands may not be administered as part of the National Park System unless they are conveyed to the United States. *Id.* In short, Section 103(c) "draws a distinction between 'public' and 'non-public lands' within the boundaries of [CSUs]," *Sturgeon*, 136 S. Ct. at 1071, and makes triply clear that non-public lands remain outside the reach of federal park management authority even if they happen to fall within the boundaries of a CSU. *See* Pet. Br. 25-31.

NPS (at 24) does not dispute that Section 103(c) limits its park management authority over non-federal *lands* within CSUs. Yet it continues to argue that Section 103(c) has no application to non-federal *waters*. *See* Resp. Br. 24-29. NPS relies on its Organic Act authority to "prescribe regulations ... concerning boating and other activities on or relating to water located within System units, including water subject to the jurisdiction of the United States." 54 U.S.C. § 100751(b). According to NPS, because the Nation River and other navigable waterways pass through the Alaska CSUs, they are "within" those units and therefore within the reach of § 100751(b). That is wrong for multiple reasons.

Foremost, NPS ignores that ANILCA defines "land" as meaning "lands, waters, and interests therein." 16 U.S.C. § 3102(1). Non-public "land" thus includes the "waters" that run through them. NPS may claim (at 31-32, 52) that it is asserting only a modest power because § 100751(b) limits it to promulgating "water-related rules." But that supposedly modest assertion of authority would impermissibly write "waters" out of ANILCA's definition of lands.

For the same reason, NPS is mistaken to assert (at 26-28) that it has authority to regulate any waters "within System units" even if those waters are not a "portion" of the unit under Section 103(c). By including "waters" in the definition of "land," 16 U.S.C. § 3102(1), Congress made clear that waters are subject to the same restrictions as dry land—*e.g.*, waters are deemed to be a part of the relevant CSU *only if they meet the definition of public lands*. If NPS were correct, there would have been no reason for Congress to address the disposition of "waters" in Section 103(c). It would not have mattered, in other words, whether waters were deemed a "portion" of a CSU or not because, either way, NPS would have plenary authority to regulate them under § 100751(b).[2]

The practical implications of NPS's interpretation confirm its implausibility. Accepting NPS's argument would grant the agency unfettered power to regulate all waters located "within" a CSU—even those located entirely on State, Native Corporation, or private lands. A pond or stream on Native Corporation-owned land in the uplands of Alaska would suddenly become subject to NPS management of "activities on or relating to" that water under § 100751(b). Not only would that override Congress's decision to define such waters as non-public, it is antithetical to ANILCA's purpose. Pet. Br. 5-9; *infra* 11-15.

ANILCA expanded the National Park System by more than 43 million acres (roughly the size of Missouri),

2. NPS asserts (at 27) that Section 103(c) "does not mention navigable waters." But there was no need to use the word "navigable" because ANILCA includes all "waters" in the definition of "land" in 16 U.S.C. § 3102(1).

and one of the statute's overriding objectives was to ensure that NPS could *not* exercise jurisdiction over the non-federal lands and waters that happened to fall within the CSU boundaries. Pet. Br. 5-9. That is precisely why ANILCA employed the concept of "public lands" and limited federal authority to such areas. But under NPS's rationale, this was largely a waste of Congress's time because NPS retained authority under the Organic Act to regulate *all* waters within a CSU regardless of whether they constitute "public lands." NPS's view of the law cannot be squared with the text of ANILCA and would eviscerate the compromise at the heart of the statute.

Pointing to the second sentence of Section 103(c), NPS further contends that the limitations on its authority are confined to "one particular class of Park Service regulations: the 'regulations applicable *solely to public lands* within such [CSUs].'" Resp. Br. 30 (quoting 16 U.S.C. § 3103(c)). NPS argues, in other words, that ANILCA is inapplicable to regulations that apply to both public and nonpublic lands because, rather conveniently, such rules would not apply "solely" to public lands.

That argument is circular and would deprive Section 103(c) of any meaning. Worse still, it would allow NPS to control the scope of its own authority: the agency could regulate any non-federal land or water (State, Native Corporation, or private) merely by issuing a regulation to that effect. It would defy logic—and contravene Congress's express intent—to interpret Section 103(c)'s second sentence as creating a massive loophole through which NPS could evade any limits on its authority merely by extending a regulation to both public and non-public lands.

Realizing that its argument would render Section 103(c) largely meaningless, NPS argues (at 31-32) that it would be limited to promulgating "certain water-related rules" and rules that are "necessary or proper for the use and management of" public lands. But, tellingly, NPS does not identify any *specific* types of regulations that Section 103(c) would prohibit it from issuing. Nor can it. If NPS is correct (at 28-29) that it possesses authority to issue rules concerning water and anything "*relating to* water located within System units," 54 U.S.C. § 100751(b) (emphasis added), then there would be few (if any) limitations on its management authority over State, Native Corporation, and private lands within the Alaska CSUs. *See* Alaska Amicus Br. 36 ("Allowing regulation of Alaska's lands and waters on the theory that they 'relat[e] to' public lands would eviscerate § 103(c) and contravene the intent of Congress.").[3]

3. NPS's citation of rules regarding waste disposal or hazardous activities (at 32) is especially misguided. The solid waste regulations were issued pursuant to specific congressional authorization enacted after ANILCA. In 1984, Congress passed Public Law 98-506, 98 Stat. 2338 (codified at 16 U.S.C. § 460l-22(c)), which expressly prohibited solid waste sites "within the boundary of any unit of the National Park System[.]" To the extent the solid waste regulations were a legitimate exercise of NPS extraterritorial authority in Alaska—a subject on which Mr. Sturgeon takes no position—that authority came from Congress's separate enactment of Public Law 98-506, not anything in NPS's Organic Act. NPS acknowledged this in a 1994 rulemaking, explaining that the "regulations implement those statutory provisions." 59 Fed. Reg. 65,948 (Dec. 22, 1994).

B. The Other Provisions of ANILCA Cited by NPS Do Not Justify Its Assertion of Jurisdiction.

NPS points to several other ANILCA provisions in an attempt to bolster its textual arguments. Specifically, NPS (at 17-18, 28, 30-31) repeatly cites 16 U.S.C. § 3191(b)(7) for the proposition that its regulatory authority is not limited to public lands. That provision of ANILCA directs NPS to prepare unit management plans containing various categories of information, including a description of "privately owned areas, if any, which are within such unit" as well as the "activities carried out in ... such areas," and the "methods (such as cooperative agreements and issuance or enforcement of regulations) of controlling the use of such activities to carry out the policies of this Act and the purposes for which such unit is established or expanded." *Id.* Based on that reference to "privately owned areas," NPS infers that its authority must extend beyond just public (*i.e.*, federal) lands. That is incorrect.

NPS glosses over the very next provision of ANILCA, which grants it authority to acquire non-federal land in Alaska CSUs from State, Native Corporation, and private landowners. *See* 16 U.S.C. § 3192. Once acquired, such lands "become part of the unit" and are "administered accordingly." *Id.* § 3103(c). Congress would not have needed to authorize acquisition of these non-federal lands if NPS already possessed plenary regulatory authority over them. Indeed, under NPS's interpretation of ANILCA, there would be no need for NPS to *ever* acquire non-federal land under Section 3192 because NPS could achieve the same policy goals by regulating the land directly.

More fundamentally, NPS would extrapolate from Section 3191's oblique reference to potential regulation of privately held land the unfettered authority to regulate all private, Native Corporation, and State-owned lands and waters in contravention of Section 103(c). NPS thus ignores the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014). Congress contemplated that NPS could regulate non-federal lands located in CSUs by acquiring them, entering into a cooperative agreement with the owner, issuing rules pursuant to a specific grant of authority, or through a combination of these approaches. But the overall statutory scheme is designed to ensure non-federal lands are not regulated as though they were part of the National Park System. NPS's interpretation of Section 3191 would render Sections 3192 and 103(c) surplusage and should be rejected. *Duncan v. Walker*, 533 U.S. 167, 174 (2001).[4]

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4. Nor do the cooperative agreements themselves support NPS's position. For example, the Gates of the Arctic management plan recognizes that, within park boundaries, the "beds of waters that are navigable . . . are owned by the State of Alaska" and that "[t]he State of Alaska has authority to manage water based on the Submerged Lands Act of 1953, the Alaska Statehood Act of 1958, and the state constitution." National Park Service, Gates of the Arctic General Management Plan 261 (2015), https://bit.ly/2C6VB9b. The plan also directs NPS to "work with the state on a case-by-case basis to resolve issues concerning the use of waterways where management conflicts arise." *Id.* at 262.

NPS's invocation (at 42-43) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1271, *et seq.*, is also misplaced. The Nation River where Mr. Sturgeon sought to use his hovercraft has *not* been designated as a wild or scenic river. *See* 16 U.S.C. § 1274. But NPS's arguments are wrong as a general matter. Far from supporting expansive jurisdiction over waters in Alaska, ANILCA modified the Wild and Scenic Rivers Act to specify that, in Alaska, the acreage included along with a river being designated "shall not include any lands owned by the State or a political subdivision of the State nor shall such boundary extend around any private lands adjoining the river in such manner as to surround or effectively surround such private lands." 16 U.S.C. § 1285b. The Wild and Scenic Rivers Act also acknowledges and protects State ownership rights in submerged lands, *see* 16 U.S.C. § 1284(f) ("Nothing in this chapter shall affect existing rights of any State, including the right of access, with respect to the beds of navigable streams, tributaries, or rivers (or segments thereof) located in a national wild, scenic or recreational river area."), and preserves State authority over fish and wildlife, *see id.* § 1284(a). That statute provides no support for NPS's position.

C. ANILCA's History and Purpose Reinforce Its Textual Limitations on NPS's Authority.

Section 103(c)'s limitations on NPS's authority to regulate non-federal lands and waters within CSUs reflect ANILCA's "two stated goals," *Sturgeon*, 136 S. Ct. at 1066, of balancing conservation with Alaskan economic development and self-sufficiency, 16 U.S.C. § 3101(d). Section 103(c) reflects Congress's balanced approach and implements its understanding "that Alaska is often the

exception, not the rule." *Sturgeon*, 136 S. Ct. at 1071; Pet. Br. 6-9, 29-31.

Throughout its brief, NPS (at 2, 5-6, 16, 19, 23, 34-35, 40-41, 43, 48) nevertheless presents a hopelessly one-sided version of ANILCA's purposes, focusing almost exclusively on environmental concerns. It is not until page 48 of its 57-page brief that NPS acknowledges in passing that ANILCA also sought to pursue "other aims" such as "safeguard[ing] private and commercial activity." According to NPS (at 48), the Court need not trouble itself with those purposes because they are "limited" and "the Park Service generally retained authority to regulate conduct on navigable waters." But far from being a minor or secondary concern, Congress understood the importance of providing "adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people," and that those interests must be pursued "at the same time" as ANILCA's conservation-related goals. 16 U.S.C. § 3101(d).

ANILCA is replete with provisions demonstrating how Congress sought to balance conservation with "the economic and social needs" of Alaskans. *Sturgeon*, 136 S. Ct. at 1070-71; *see also* Ahtna Amicus Br. 36 (arguing that "the legislative history clearly demonstrates that Section 103[] was added specifically to preserve State, Native, and private control over lands within areas included within CSUs"). This Court should reject NPS's efforts to disregard the economic and social purposes of ANILCA, elevate the conservation purposes above all else, and then claim unfettered authority to implement its cherry-picked statutory objectives.

NPS (at 50-51) also tries to downplay the importance of Section 103(c) by arguing that its "placement" and the "manner in which Congress added" it show that it was merely an afterthought. But Section 103(c) is a federal statute, and this Court should decline NPS's invitation to assign less weight to this provision based on its section heading or placement. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

Regardless, it is hardly anomalous that a statutory provision addressing the regulatory treatment of the lands and waters within CSUs would be placed in a section labeled "Maps." ANILCA is about geographic boundaries, and it relies on maps—rather than legal descriptions—to establish those boundaries. *See* 16 U.S.C. § 3103(a) ("In the event of discrepancies between the acreages specified in this Act and those depicted on such maps, the maps shall be controlling.").

Nor is this, as NPS contends (at 50-51) an "elephants in mouseholes" situation. ANILCA has more than 100 sections, yet the "Maps" provision comes *third*—following only the preamble and definitions sections. *See* Pub. L. No. 96-487, 94 Stat. 2371, § 103 (1980). Far from being buried in a "mousehole," the Maps section is front and center in the statutory scheme.

NPS's discussion (at 51-52) of ANILCA's legislative history fares no better. NPS is flatly wrong to characterize Section 103(c) as an unimportant, last-minute technical correction. This provision was originally located in Section 810(c) of H.R. 3651, the "Udall-Anderson" bill

that eventually became ANILCA. *See* H.R. 39, 96th Cong. (1979). After the House version of ANILCA passed, *see* 125 Cong. Rec. 11,458-59 (1979), it was replaced with the Senate's version, which did not include Section 810(c), *see* 126 Cong. Rec. 21,891 (1980); H.R. 39, 96th Cong. (1980). When Congress realized the language had been omitted during the reconciliation process between the House and Senate versions of the statute, it was immediately restored by H.R. 452, a House Concurrent Resolution, before ANILCA was signed into law. 126 Cong. Rec. 30,495-500 (1980); *see* H.R. Con. Res. 452, 96th Cong. (1980).

NPS (at 52) relies solely on a partial quotation from Representative Udall to support its characterization of Section 103(c) as a minor technical correction. Even if NPS's quotation of Representative Udall were accurate and probative, it would fail to reconcile NPS's interpretation with the overall context that led to the introduction and passage of the language that became Section 103(c). "The central issue of [ANILCA's] floor debates was the appropriate balance between exploitation of natural resources, particularly energy resources, and dedication of land to conservation units." *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 553 (1987).

But NPS's quotation is not accurate because it omits important aspects of Representative Udall's statements. Representative Udall, one of ANILCA's sponsors, had earlier explained at length that ANILCA's inclusion of ANCSA (*i.e.*, Native Corporation) lands within CSU boundaries should not be construed as subjecting those lands to federal regulation. *See* 125 Cong. Rec. 9,905 (1979) (statement of Rep. Udall). When the concurrent resolution reinserting Section 103(c) into ANILCA (H.R.

452) was introduced, he reiterated that it would not change ANILCA in any material respect—including its protection of ANCSA lands from regulation. He characterized H.R. 452 as containing some changes that were "technical or perfecting in nature," but also others that "[we]re more extensive." 126 Cong. Rec. 30,498 (1980) (statement of Rep. Udall). And Representative Udall was emphatic that Section 103(c) would ensure that "only public lands (and not State or private lands) are to be subject to the conservation unit regulations applying to public lands." *Id.*; *see* Pet. Br. 5-9.[5]

D. Congress Has Not "Ratified" NPS's Interpretation of "Public Lands."

NPS's argument (at 37-40) that Congress "ratified" its interpretation of "public lands" through a series of funding bills in 1996, 1998, and 1999 is misplaced. "[T]he view of a later Congress cannot control the interpretation of an earlier enacted statute." *O'Gilvie v. United States*, 519 U.S. 79, 90 (1996). Even putting that aside, NPS's ratification arguments fail for several independent reasons. At the outset, the funding bills cited by NPS

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5. NPS's assertion (at 46-47) that respecting Alaska's authority over its navigable waters would create an unworkable jurisdictional "patchwork" is unpersuasive. To the extent that ANILCA creates a "patchwork," it is the inevitable byproduct of Congress's decision to exclude private, Native Corporation, and State lands and waters from CSUs. This approach is hardly unique to ANILCA. For example, under the Wild and Scenic Rivers Act, only designated portions of rivers qualify for inclusion under the statute. 16 U.S.C. § 1274. Navigability in general, moreover, must always be determined on a "segment-by-segment basis." *PPL Montana v. Montana*, 565 U.S. 576, 593 (2012).

pertained only to ANILCA's subsistence-use provisions in Title VIII, which do not dictate the outcome here. *See* Pet. Br. 34 n.4; *infra* 20-21.

Moreover, "ratification" requires Congress to place its affirmative imprimatur on an agency interpretation. The very case cited by NPS, *CFTC v. Schor*, 478 U.S. 833 (1986), makes clear that ratification occurs when Congress enacts "positive legislation" codifying an agency's position into the statutory text, *id.* at 846. Here, none of the funding bills cited by NPS amended ANILCA's definitions or substantive provisions regarding "public lands."

To the contrary, the funding bills only temporarily delayed the subsistence regulations to afford Alaska an opportunity to address this issue in the first instance. After Alaska failed to meet the deadline, the funding moratorium lapsed and the regulations took effect. But, far from endorsing any particular position about the regulations or the underlying legal rationale, Congress carefully refrained from weighing in on the merits of the matter. *See* Pub. L. No. 104-134, § 336, 110 Stat. 1321 (1996) ("None of the funds made available to the Department of the Interior or the Department of Agriculture by this or any other Act may be used to issue or implement final regulations, rules, or policies pursuant to Title VIII of [ANILCA] to assert jurisdiction, management, or control over navigable waters transferred to the State of Alaska ... ."); Pub. L. No. 105-277, § 339(d), 112 Stat. 2681 (1998) ("Nothing in this section invalidates, validates, or in any other way affects any claim of the State of Alaska to title to any tidal or submerged land in Alaska.").

E. The Reserved Water Rights Doctrine Cannot Convert the Nation River into "Public Land."

Although its primary argument focuses on the Organic Act, NPS (at 32-37) argues in the alternative that the navigable rivers within Alaska CSUs are, in fact, "public lands" under ANILCA. But because NPS concededly lacks title to these lands, it asserts as a fallback that it need only show a federal "interest" in the relevant waters in order to regulate them as public lands.

There is a good reason why NPS did not lead with this argument. It rests on a highly selective quotation of the statute. The word "interests" appears only in the definition of "land," which "means "lands, waters, and interests therein." 16 U.S.C. § 3102(1). NPS would stop there and claim authority. But ANILCA does not stop there. Section 103(c) and the related definitions provide that "public land" means in relevant part "Federal lands," which are defined as "lands the title to which is in the United States after December 2, 1980." 16 U.S.C. §§ 3102(2)-(3). In short, "interests" alone are not enough; instead, ANILCA requires that *title* to any such "interests" must be vested in the United States.[6]

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6. NPS (at 32-33) cites *Amoco*, 480 U.S. 531, for the proposition that a federal "interest" is sufficient to constitute "public lands" regardless of title. But *Amoco* merely held that the Outer Continental Shelf was not covered by a provision of ANILCA that applied to federal lands "in Alaska." *Id.* at 548-49. This Court was "hesita[nt]" to address the precise scope of the "title" requirement because it was unnecessary to the Court's holding, and nothing in *Amoco* purports to resolve that issue. *Id.* at 548 n.15.

NPS thus misses the point altogether when it devotes several pages (at 34-36) to arguing that it has "interests" in the navigable waters in Alaska, pursuant to the reserved water rights doctrine, that give it regulatory authority. The cases cited by NPS—which Mr. Sturgeon has already addressed at length, Pet. Br. 34-41—merely hold that the government is entitled to a sufficient volume of water to accomplish the objectives of reserved federal lands. *See, e.g., Cappaert v. United States*, 426 U.S. 128 (1976) (government entitled to sufficient volume of water to preserve the "scientific value" of a geothermal pool in a limestone cavern); *Arizona v. California*, 373 U.S. 546, 599 (1963) (desert Indian reservation entitled to a volume of water "essential to the life of the Indian people"). But this Court has never held that a reserved water right confers plenary regulatory power over the body of water at issue. To the contrary, the Court has emphasized that "[t]he implied-reservation-of-water-rights doctrine ... reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert*, 426 U.S. at 141.

The hovercraft ban exceeds the scope of any reserved water rights the United States might hold, even if that doctrine applies. Pet. Br. 37-41. NPS's only response is to again retreat to the Organic Act and generalized assertions of statutory purpose. NPS Br. 34-35, 37. But generalities cannot change the reality that hovercraft use has no effect on the volume of water available for federal purposes, nor does it result in—to use NPS's own words (at 34)—"depletion or diversion" of water. Whatever the scope of the reserved water rights doctrine, it cannot justify a hovercraft ban—let alone plenary NPS jurisdiction over non-public waters.

Finally, NPS argues (at 36) that a reserved water right is, in fact, a title interest that satisfies ANILCA's definition of "public lands." That argument is inconsistent with the brief in opposition and the Ninth Circuit's decision, both of which conceded that the United States does not hold title to navigable waters. *See* Br. in Opp. 14 ("'[N]either sovereign nor subject can acquire anything more than a mere usufructuary right' in navigable waters."); Pet. App. 17a ("Water cannot be owned."). The three cases NPS cites in support of its position are wholly inapposite. In *Federal Power Commission v. Niagara Mohawk Power Corporation*, 347 U.S. 239 (1954), this Court held that "the water itself, the corpus of the stream, *never becomes or, in the nature of things, can become, the subject of fixed appropriation or exclusive dominion*, in the sense that property in the water itself can be acquired or become the subject of transmission from one to another," *id.* at 247 n.10 (emphasis added). And the other two cases cited by NPS use the word "title" in passing but do not contain any analysis of whether a reserved water right equates to a "title" interest in such water. *See Crum v. Mt. Shasta Power Corp.*, 30 P.2d 30 (Cal. 1934); *Racliff's Ex'rs v. The Mayor*, 4 N.Y. 195 (1850). Cases that have actually addressed the question hold that "the navigational servitude and reserved water rights are not the type of property interests to which title can be held." *Totemoff v. State*, 905 P.2d 954, 965 (Alaska 1995); *see also Kohl Indus. Park Co. v. Rockland County*, 710 F.2d 895, 903 (2d Cir. 1983) ("[I]n the absence of limiting language, 'title' is commonly understood to mean a fee interest," not merely a lesser interest such as an easement.).

F. There is No Need for this Court to Address the *Katie John* Line of Decisions.

Finally, NPS (at 41-42, 47-50) argues that the subsistence priority provisions in Title VIII must mean that ANILCA did not foreclose NPS regulation of Alaska's navigable waters flowing through CSUs. But Title VIII is irrelevant to discerning what authority ANILCA granted to NPS. Title VIII was one of the distinct sections added to ANILCA to address ongoing issues related to ANCSA; it was not directly related to the creation of CSUs. As noted, it has its own preamble and is the only section of ANILCA to invoke Commerce Clause authority. Pet. Br. 33-34 & n.4. Title VIII stands alone as a broad grant of federal authority to regulate and support traditional subsistence uses in Alaska, and this Court need not reach any issues regarding subsistence uses to rule in Mr. Sturgeon's favor. *See* Alaska Amicus Br. 29-35 ("The *Katie John* decisions are not at issue in this appeal...."); Ahtna Br. 30-36 ("[A]ny decision by this Court should leave undisturbed the subsistence priority established by the *Katie John* decisions.").

NPS laments (at 48-50) that leaving the subsistence priority in place would lead to two definitions of "public lands" within ANILCA. But this Court has recognized that the "presumption of consistent usage" is only a presumption—not an ironclad rule—and must sometimes yield to the broader statutory context. *Utility Air*, 134 S. Ct. at 2441. In light of Title VIII's unique text, preamble, purpose, and source of congressional authority, a ruling in favor of Mr. Sturgeon would not affect the existing

definition of "public lands" in the subsistence context.[7] Regardless, that issue is beyond the scope of the question presented and need not be resolved here.

III. If Any Interpretive Canon Applies Here, It Is the Federalism Canon, Not *Chevron* Deference.

NPS's halfhearted plea (at 55-57) for *Chevron* deference should be rejected, as ANILCA is unambiguous and NPS's position is unreasonable. NPS made the same plea for *Chevron* deference the last time the case was before this Court, *see* Resp. Br. at 44-46, *Sturgeon v. Frost*, 136 S. Ct. 1061 (2016) (No. 14-1209), but this Court declined.

NPS's argument should fare no better this time. Even though Section 103(c) is designed to *limit* NPS's authority over non-federal land, NPS (again) interprets it to impose no meaningful limit on NPS's authority to regulate non-federal lands within CSUs. Any construction of Section 103(c) that allows NPS to regulate non-federal lands in CSUs as though they were part of the National Park System—an outcome that ANILCA was expressly intended to avoid—is, by definition, unreasonable.

NPS's plea for deference also violates the clear statement rule. This Court rejects "request[s] for administrative deference" to "avoid [] significant

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7. Contrary to NPS's suggestion (at 50), *Amoco* does not foreclose this result. The issue in that case was when land is deemed to be "in Alaska." *Amoco*, 480 U.S. at 547-48. The Court did not directly analyze—much less decide—the meaning of "public lands" in the context of ANILCA's subsistence provisions. *See supra* n.6.

constitutional and federalism questions." *Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001); *see also Miller v. Johnson*, 515 U.S. 900, 923 (1995). If there is to be any thumb on the scale in the interpretation of ANILCA, it should weigh in the State's favor under the clear statement rule. *See* Pet. Br. 31-34; *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) ("If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.").

Alaska's navigable rivers are indispensable to the economic, social, and cultural life of its citizens. *See* Alaska Amicus Br. 6-17. Those issues go to the core of why ANILCA limited federal power over Alaska's CSUs. Especially in an area as remote and sparsely populated as Alaska, the State has a sovereign obligation to "ensure open access to its waters for navigation, fishing, and commerce." *Id.* at 9-10. Moreover, numerous towns and villages in Alaska are not accessible by road and can be reached only by boat, airplane, snowmachine, all-terrain vehicle, or other unconventional modes of transportation. *Id.* at 11-12. It strains credulity for NPS to suggest (at 53-55) that there are no federalism implications when a federal agency overrides a state government's judgments about how its citizens can travel through remote and difficult-to-reach areas. Nothing in ANILCA comes close to providing the clear statement needed to displace Alaska's sovereignty in this manner. *See* Idaho *et al.* Amicus Br. 4-9.

Last, NPS (at 53-54) makes the surprising assertion that the clear statement rule should run in its favor

because Mr. Sturgeon is trying to usurp its "traditional" power over navigable waters. But NPS has no "traditional" authority, only the authority it is conferred by statute. "[A]n agency literally has no power to act ... unless and until Congress confers power on it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

CONCLUSION

The Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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October 11, 2018